INDEX.

Page

Subject Index.

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement 2

Argument 8

Conclusion 19

Appendix 21

Table of Cases Cited.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307 ..... 3, 8, 11, 16, 17, 18

Dravo Contracting Co. v. James, 114 F. (2d) 242, Cert. Den. 312 U. S. 678 15

Freeman v. Hewit (1947), 329 U. S. 249 ..... 3, 8, 11, 16, 17

James v. Dravo Contracting Co. (1937), 302 U. S. 134. 14

Norton Company v. Department of Revenue (1951), 340 U. S. 534 ..... 13, 17

Spector Motor Service, Inc., v. O'Connor (1951), 340 U. S. 602 19

Stone v. York Ice Machinery Corp. (1942), 10 So. (2d) 380 12

York Mfg. Co. v. Colley (1918), 247 U. S. 21 ..... 8, 9, 10, 11, 12, 13, 18

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 261.

GROSS INCOME TAX DIVISION, INDIANA DEPARTMENT OF STATE REVENUE, STATE OF INDIANA, et al.,
Petitioners,

vs.

SURFACE COMBUSTION CORPORATION,
Respondent.

On Petition for Writ of Certiorari.

BRIEF

For the Respondent in Opposition.

OPINION BELOW.

The opinion of the Supreme Court of Indiana appears in the printed record (R. 43-80), and is reported in 111 N. E. (2d) 50. The same opinion covered the companion case to which the petition in No. 262 is addressed.

JURISDICTION.

The judgment of the Supreme Court was entered on March 19, 1953 (R. 43), and the petitioners' petition for rehearing was denied on April 21, 1953 (R. 82). Time for filing a petition for a writ of certiorari was extended on July 13, 1953 to August 20, 1953 (R. 87). The petition was filed on August 14, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

Whether the Supreme Court of Indiana properly held invalid, as being in conflict with the Commerce Clause in Section 8 of Article I of the Constitution of the United States, the assessment and collection by the petitioners of the Indiana gross income tax on the gross receipts from sales of chattels personal in interstate commerce.

STATUTE INVOLVED.

The pertinent parts of the Indiana Gross Income Tax Act are set out in the Appendix, infra. The Act excepted from the tax gross income derived from business conducted in interstate commerce "to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States . . .."

STATEMENT.

The Supreme Court of Indiana affirmed a judgment rendered in this case by the Superior Court of Marion County of the State of Indiana in favor of the respondent for the recovery of amounts of Indiana gross income tax which the petitioners had assessed and collected on gross receipts from sales of industrial heat treating furnaces in interstate commerce. The State Supreme Court followed

the decisions of this Court in **J. D. Adams Mfg. Co. v. Storen** (1938), 304 U. S. 307, and **Freeman v. Hewit** (1947), 329 U. S. 249, that the Indiana gross income tax as applied to gross receipts from sales of personal property in interstate commerce constitutes a direct burden on, and interference with, interstate commerce in violation of the Commerce Clause in Section 8, Article I, of the Constitution of the United States.

The decision of the Supreme Court of Indiana is based upon the special findings of fact made and filed by the trial court (R. 13-35, 39). The facts in so far as they are relevant to the issues presented by the petition may be summarized as follows:

The respondent is a corporation organized under the laws of Ohio and has its office and place of business in the City of Toledo, Ohio, where it is engaged, as its predecessors in interest had been, in the business of manufacturing and selling industrial heat treating furnaces. The respondent is the assignee of the refund claims of its predecessors herein sued upon. The respondent and its predecessors in interest are in the special findings collectively designated as "the Company" (Findings 1-7, R. 13-16). The manner in which the sales in question were made and consummated was always the same under each successive ownership of the business, so that said collective designation, "the Company," is appropriate and will likewise be used in this summary.

The petitioners are the state agencies and officers of Indiana charged with the administration of its Gross Income Tax Act. They and their predecessors are in the special findings collectively referred to as "the Department" (Findings 8-10, R. 16-17).

The Department made the assessment involved in this case notwithstanding its legal department had previously issued a ruling in a letter to the Company dated January

11, 1935, that its sale transactions with purchasers in Indiana were "made in interstate commerce and for that reason there is incurred no gross income tax liability under the provisions of the Gross Income Tax Law" (Finding 13, R. 20-21).

Neither the respondent nor any of its predecessors in interest, designated as "the Company," was ever a resident of Indiana, or ever maintained any warehouse or manufacturing plant in Indiana, or ever had any solicitor, agent, or officer in Indiana with authority to enter into contracts there. The Company's office, place of business and factory were at all times located in the City of Toledo, Ohio (Findings 1-6, R. 13-15).

The industrial heat treating furnaces which the Company manufactured and sold and which were the subjects of the sales in question are complex furnaces used in the manufacturing industry for effecting desired metallurgical or chemical changes in casting and metal parts, used in automobiles, machinery, and other articles, through the application of various heat treating processes (Finding 22, R. 29). The furnaces produced heat by combustion of a mixture of gas and air. The combustion process was performed by an intricate system of air blowers, recirculating air heaters, drums, draft ducts, ventilating flues, manifolds, pipes, valves and other devices which were a part of the furnace. They contained mechanisms for mixing the fuel and the air in the proper proportions to produce the type of combustion necessary for a particular heat treating process and for controlling temperatures, atmospheres and time cycles as required thereby, and contained moving parts and mechanisms for the purpose of conveying the material through the furnace for heating and cooling, including conveyors, motors and bearings. With respect to the conveyor mechanism, the principal types were (a) the car bottom furnaces, in which the material was loaded on a car which was pulled inside the heat chamber, (b)

the roller hearth furnaces, in which the material was placed on rotated rolls which conveyed it through the furnace, (c) the pusher type furnaces, in which the material was placed on trays which were automatically pushed through the furnace, (d) the chain or belt conveyor furnaces, in which the material was placed on slats which conveyed it through the furnace, and (e) the rotary furnaces, in which the hearth of the furnace automatically rotated with the material. The doors of the heat chamber were synchronized with the conveyor mechanism and were opened and closed automatically. The heating operations and the mechanical conveyor operations in said furnaces were automatically controlled, the controls being mounted on the control panel for the use of the operator. Said furnaces were commonly operated in unison with other machines in the production line, the material being brought to and taken from the furnace by conveyor mechanisms of the customer (Findings 24-26, R. 30-31).

When the Company learned that a potential customer in Indiana was interested in acquiring one of these furnaces, it made a study of the customer's needs and selected a type of furnace engineered and designed for the desired heat treating process and adaptable to the needs of the customer. Thereupon the Company at its Toledo office prepared a "Proposal and Specifications" for the manufacture and sale of the selected type of furnace and transmitted it to the customer in Indiana for signature and return to Toledo where it was then accepted and signed by an executive officer of the Company and thereupon became a contract of purchase and sale (Findings 34-36, R. 33-34). Each contract provided that the furnace therein described should be fabricated by the Company at its manufacturing plant in Toledo, Ohio, and be shipped from there direct to the customer in Indiana and there installed in working condition by the Company, all for a lump sum purchase price (Finding 37, R. 34).

The amount expended by the Company for salaries, wages and expenses of its factory trained employees while engaged at the plants of Indiana customers in the work of installing, testing and adjusting the furnaces averaged 10.7% of the purchase price of the furnace (Finding 31, R. 32).

These heat treating furnaces are in general use in the manufacturing industry. They are designed and manufactured in different types in order to apply different heat treating processes, and any of the furnaces could be moved after installation and use in one establishment to and used in another establishment employing the same particular heat treating process for which the particular furnace was designed (Findings 23, 27, R. 30-31). None of the furnaces was designed or manufactured with respect to any particular building or location. They were connected to the purchaser's premises only by means of nuts screwed to bolts imbedded in a concrete floor or foundation furnished by the purchaser and by means of water and gas pipe connections and electric wiring furnished by the customer (Finding 27, R. 31).

The furnaces were of different sizes and capacities. The smaller of them were fully assembled at the Company's plant at Toledo, Ohio, and were from there shipped by the Company in full assembled form direct to the customers at their plants in Indiana for installation and adjustment to the customer's needs. The larger furnaces would in fully assembled form be too large for transportation on railroad cars or motor trucks, and were therefore shipped by the Company in partially assembled form from Toledo, Ohio, to the customers at their plants in Indiana and were there fully assembled at the time of installation (Findings 28-29, R. 31-32). Both parties to each contract contemplated and intended at the time of entering into the contract that the furnace should be shipped interstate by the Company from Ohio direct to the customer in Indiana (Finding 38, R. 34).

Due to the complex mechanical nature of these furnaces, it was "necessary" that their installation and adjustment at the customers' plants in Indiana should be made by the Company's skilled factory trained engineers and employees in order to place them in satisfactory operating condition for performing their intended functions and to make possible the final delivery of them to the purchaser and the collection by the Company of the purchase price from the purchaser (Findings 30-31, R. 32). Each contract provided for this and provided for the payment by the purchaser of a "lump sum" purchase price for the furnace when so installed and adjusted (Finding 37, R. 34).

It was expressly found and stated in the special findings of fact that the furnaces "were machines performing a manufacturing function in industry and were and at all times remained chattel personal property (Finding 33, R. 33); that each contract "was a contract for the purchase of chattel personal property and the sale of chattel personal property for a purchase price" (Finding 44, R. 39); and that "the performance of each of said contracts by the customer was a purchase of chattel personal property for a purchase price, and the performance of each of said contracts by the Company was a sale of chattel personal property for a purchase price" (Finding 43, R. 35).

The Company installed and adjusted each furnace at the customers' plant and thereupon title passed to the customer, as provided in the contract, and each Indiana customer paid the purchase price for the furnace to the Company at its Toledo, Ohio, office upon invoices sent from there (Findings 40-41, R. 35).

The Department assessed the Indiana gross income tax on all of the gross receipts so received by the Company in the years involved from its said sales of such furnaces to its Indiana customers (Finding 21, R. 29).

ARGUMENT.

This case is correctly decided on its own facts in complete harmony with the apposite decisions of this Court, and does not present any question warranting further review by this Court.

The decision of the case is based on the trial court's special findings of fact (R. 13-35, 39), which the state supreme court held were fully sustained by sufficient evidence (R. 45) and which it accepted as correctly found (R. 46). Upon those facts and on authority of this Court's decision in **York Mfg. Co. v. Colley** (1918), 247 U. S. 21, the Court correctly concluded that all of the transactions from which the gross receipts in question came "are clearly sales of personal chattels in interestate commerce and the installation and reassembling where required, were inherently a part of, and a necessary incident to, the sale" (R. 65). And upon the facts in the special findings and on authority of this Court's decisions in **J. D. Adams Mfg. Co. v. Storen** (1938), 304 U. S. 307, and **Freeman v. Hewit** (1947), 329 U. S. 249, the Court correctly concluded that the levy of the Indiana gross income tax upon these gross receipts "is a direct tax upon the gross income (receipts) derived from sales in interstate commerce and, as such, directly burdens, and interferes with, the free flow of such commerce" in violation of the Commerce Clause in Section 8 of Article I of the Constitution of the United States (R. 79).

The subsidiary question whether the transactions here involved constituted interstate commerce, and the main question whether the Commerce Clause prohibited the imposition of the Indiana gross income tax on the gross receipts derived from these transactions were the only two federal questions decided by the Supreme Court of Indiana. Eighteen pages of the Court's opinion are devoted to the

consideration and decision of said subsidiary question (R. 48-65), and fourteen pages of the opinion are devoted to the consideration and decision of said main question (R. 65-80). The opinion correctly summarizes the special findings of fact (R. 46-48), and carefully reviews and correctly distinguishes the cases on which the parties rely for their respective positions on each of those questions (R. 48-79). It is manifest from this exhaustive and able opinion that both of these questions were correctly decided upon authority of ruling decisions of this Court.

In **York Mfg. Co. v. Colley**, supra, this Court established a clear cut precedent for the correct decision of said subsidiary question in the instant case. In that case this Court applied to a transaction, similar to the transactions here involved, the well established principle which it restated as follows: "that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled to the protection of the Constitution of the United States resulting from that relation." In that case the contract provided for the sale of a complex ice making plant guaranteed to produce 3 tons of ice a day, to be shipped in parts from Pennsylvania to the purchaser's place of business in Texas, and there to be "erected and connected" and submitted to practical test in operation under supervision of an engineer to be sent there by the seller at a per diem charge to the purchaser. The parts to be shipped, and then erected and connected, consisted of "gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator, and other machinery and accessories, including apparatus for utilizing exhaust steam for making distilled water for filling the cans." The assembling and installation of the parts and the practical testing of the plant in operation were necessary "before the obligation to finally receive it would arise." This Court held that the contract was one "inherently relating

to and intrinsically dealing with the thing sold—the machinery, and all of its parts constituting the ice plant." The Texas courts had concluded that the assembling and installation of the parts and the practical testing of the installed ice making plant in Texas were wholly separable from the interstate transaction and that the seller had in that respect engaged in local business in Texas without obtaining a state permit as a foreign corporation and could therefore not maintain an action in the courts of Texas to recover the purchase price for the ice plant. This Court, however, reversed on its conclusion that, under application of the foregoing principle to the particular contract and the facts before the court, these activities in Texas were immediately and inherently connected with the intrinsically interstate sale transaction and were an inseparable part thereof.

The decision in **York Mfg. Co. v. Colley**, supra, is clearly apposite here in view of the similarity of the essential features of the sales contracts in the two cases and the similar necessity in them that the installation and testing of the complex things sold had to be done under supervision of specially trained and skilled engineers and employees in order to make acceptance by and delivery to the purchaser possible. Finding 37 (R. 34) shows that each of the contracts provided for the fabrication of the furnace by the seller at Toledo, Ohio, for its shipment from thence to the purchaser in Indiana, for its installation and adjustment by the seller at the purchaser's plant and for passage of title to the furnace from the seller to the purchaser upon full payment of the stipulated "lump sum" price "on or after the complete assembly and adjustment of said furnace." The special findings show that these industrial heat treating furnaces were no less complex in nature than the ice making plant in the **York Mfg. Co.** case, and that in order to make the sale, delivery and receipt of the purchase price possible it was necessary that

the seller install them in satisfactory operating condition at the customer's plants (Findings 23-31, R. 30-32). The smaller of the furnaces were completely assembled at the seller's plant in Ohio and were shipped and installed in fully assembled form. The larger furnaces were shipped in partially assembled form, due to the inability of railroad cars or trucks to carry their size and weight in fully assembled form, and were fully assembled and installed at the customer's plants (Findings 28-29, R. 31-32). In accordance with the contracts the furnaces were fabricated completely in Ohio, shipped from thence directly to the customer in Indiana, and there installed (Findings 38-40, R. 34-35). Upon their "acceptance by the customer and payment in full of the purchase price, the Company delivered said furnace to said customer, and title to said furnace passed to said customer" (Finding 41, R. 35). It is expressly found in Finding 43 (R. 35) that "the performance of each of said contracts by the Company was a sale of chattel personal property for a purchase price." It is thus plain that the decision in **York Mfg. Co. v. Colley**, supra, is apposite and is clear authority for the conclusion reached by the Supreme Court of Indiana on said subsidiary question.

The gross receipts here in question having plainly been received by the seller directly from the purchasers in payment of the "lump sum" purchase prices for the furnaces sold directly by the seller to the purchaser in exclusively interstate commerce, the main question, whether the imposition of the Indiana gross income tax upon these receipts is repugnant to the Commerce Clause in Section 8 of Article I of the federal Constitution, is ruled by this Court's decisions in **J. D. Adams Mfg. Co. v. Storen**, supra, and **Freeman v. Hewit**, supra. Those cases were appeals from decisions by the Supreme Court of Indiana, and in both of them this Court held that the imposition of this same Indiana gross income tax upon the gross receipts re-

ceived in payment of the purchase prices of personal property sold and transported in interstate commerce is prohibited by the Commerce Clause. On authority of those cases the Supreme Court of Indiana correctly concluded that the tax assessed and collected in the instant case offended the Commerce Clause and is invalid.

None of the reasons, numbered 1-7, advanced in the petition (Pet. 11-20) for allowance of a writ of certiorari justifies issuance of the writ. These are discussed here in the order in which they appear in the petition.

1. The first reason given for allowance of the writ is the claim that the decision of the Supreme Court of Indiana is in conflict with the decision of the Supreme Court of Mississippi in **Stone v. York Ice Machinery Corp.** (1942), 10 So. (2d) 380, on the question whether the sale transactions in the instant case were transactions in interstate commerce. The petitioners claim that this "will result in conflict and confusion among the States upon what we believe to be similar, if not identical, facts" (Pet. 13). The opinion of the Supreme Court of Indiana clearly distinguishes the Mississippi case from the instant case on the basis of the difference in the facts of the two cases (R. 48-49). Both opinions refer to this Court's decision in **York Mfg. Co. v. Colley**, supra, and they do not differ as to its meaning. The Indiana Supreme Court points out the factual similarities rendering that decision apposite to the instant case, whereas the Supreme Court of Mississippi points out what it regarded as distinguishing factual dissimilarities rendering, in its opinion, the decision in the **York Mfg. Co.** case inapposite to the case before it. There clearly is no conflict between those two state cases **on any federal question.**

2. The second reason advanced in the petition is that the work of installing the furnaces at the customers' plants

in Indiana should be regarded as the source of the gross receipts in question on the basis of **Norton Company v. Department of Revenue** (1951), 340 U. S. 534, where the petition says, "this Court held that where local services rendered in the destination state were decisive factors in establishing and holding the market, that such local services were sufficient to attribute the income to the state in which such services were performed" (Pet. 13). The "services" in Illinois to which this Court referred in that case had nothing to do with the installation and adjustment of the things sold, as in the instant case and in the **York Mfg. Co.** case. In the **Norton Co.** case, a Massachusetts corporation qualified in Illinois to do a local business in that state in the sale and distribution of abrasive machines and supplies and for that purpose it operated a branch office and warehouse in Chicago. The branch office also performed services for Illinois customers by way of forwarding their orders for items, not in local stock, to the company's home office in Massachusetts and of delivering them after receiving them with other items shipped to the branch office in carload lots. The Court said that these services were related to the corporation's competition for local trade in Illinois and that the evidence did not relate them to interstate commerce as against local commerce.

We here point out that the petition ignores the phase of this Court's decision in the **Norton Co.** case that clearly is apposite. That case also involved exclusively interstate sales where customers in Illinois themselves placed orders directly with the corporation's home office in Massachusetts and where the goods were shipped from there directly to the customers in Illinois. As to those sales, this Court held that the income was not subject to the Illinois Occupation Tax, based on gross receipts. There is nothing in the **Norton Co.** case that affords a reason for allowance of the writ of certiorari in the instant case.

3. The third reason advanced is that on the basis of the decision in **James v. Dravo Contracting Co.** (1937), 302 U. S. 134, the gross receipts here in question should be held subject to the tax, because the petitioners cannot see any significance in the difference between the fact in that case that the materials shipped interstate were used in constructing a dam and locks in a river bed and became a part of the structure and the fact in the instant case that the chattel furnaces sold and transported in interstate commerce remained chattel personal property after they were bolted to the customer's concrete foundation. The contracts in the **Dravo** case are in no sense apposite here. That case was an appeal from a District Court three-judge decision, and it involved construction contracts between a Pennsylvania corporation, admitted in West Virginia for doing business, and the United States, as the other party, for the construction in West Virginia of locks and dams in two navigable streams. Certain lock gates and other parts used in the construction of the locks and dams were fabricated by the construction company at its plant in Pennsylvania and from there shipped to the construction sites in West Virginia where they were incorporated into the dam and lock structures. West Virginia imposed its gross income tax on all of the gross receipts received by the contractor under these construction contracts. The questions presented in the Supreme Court, in the words of the opinion, were:

> ". . . (1) whether the State had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden upon the operations of the Federal Government."

It was held that the construction sites were not under the exclusive jurisdiction of the United States and that West Virginia could tax the gross receipts derived from local activities on the construction sites within the territorial

limits of that state, but **not** the gross receipts from the activities which the contractor carried on in Pennsylvania in fabricating said lock gates and parts. The Court said:

> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly."

Following remand of the case by the Supreme Court, the District Court entered a decree apportioning the gross receipts "in accordance with the cost of work performed in the respective states," and both sides appealed from that decree to the Court of Appeals for the Fourth Circuit, where the decree was held erroneous and was reversed. **Dravo Contracting Co. v. James,** 114 F. (2d) 242, cert. den. 312 U. S. 678. The Court of Appeals held that the gross receipts could not validly be apportioned on a cost basis, and further held that the apportionment which the Supreme Court directed be made was meant to be the separation from the total gross receipts under the contracts of those amounts which Government paid **separately** for the lock gates and other items fabricated or acquired and stored in Pennsylvania until used, the title to which passed to the Government in Pennsylvania with the making of the payments. Those payments needed only to be totaled and the total subtracted from the total gross receipts in order to determine the portion thereof which had its source in West Virginia and the portion that had its source in Pennsylvania. The Court of Appeals remanded the case to the District Court with direction to enjoin collection of the tax on the portion of the gross receipts which the taxpayer derived **"from payments made upon deliveries or fabrica-**

tion at its Pittsburgh plant. . . ." (Emphasis supplied.) The tax was allowed on the remaining portion of the gross receipts—being the payments made for the work that was done strictly within the borders of West Virginia, which included the work of installing and incorporating **the Government's own lock gates and parts** in the dam and lock structures.

It is thus clear that the **Dravo** case did not apportion gross receipts from interstate commerce, but only segregated gross receipts from **intrastate** commerce in accordance with the separate payments that were made for what was done locally in the respective states of Pennsylvania and West Virginia, and it permitted West Virginia to tax only that portion which had its source exclusively within its borders. The case does not in any manner support petitioners' contention that the gross receipts in the instant case had their source in construction work in Indiana.

4. The fourth reason advanced is the claim that since, under the decision in **J. D. Adams Mfg. Co. v. Storen,** supra, Ohio could not tax the gross receipts in question, Indiana is permitted to tax them because no multiple taxation would result. This Court clearly did not mean by its decision in that case to say that only the state of origin is prohibited from laying such a tax on such gross receipts. The plain import of the decision and opinion in that case is that neither the state of origin nor the state of destination may lay a direct tax on the gross receipts from interstate sales. It was clearly so understood by Justice Rutledge who, in a footnote to his concurring opinion in **Freeman v. Hewit,** supra, said: "The Adams decision, of course, made no direct ruling upon an actual tax laid by the state of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could

be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of origin, encountered" (329 U. S. 249, 278). Moreover, as was pointed out hereinbefore, this Court held in **Norton Company v. Department of Revenue**, supra, that Illinois, as the state of destination, could not validly lay its Occupation Tax on the income received from sales which were clearly made in interstate commerce.

5. The fifth reason advanced is that the imposition of the Indiana gross income tax on the gross receipts in question did not amount to a regulation of or burden upon interstate commerce, assuming that the gross receipts were derived from interstate commerce. This is precisely contrary to the express decisions of this Court as to the effect of such imposition of this tax. In **J. D. Adams Mfg. Co. v. Storen**, supra, it was expressly said that "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution" (304 U. S. 307, 311). And in **Freeman v. Hewit**, supra, it was expressly held that "What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce" (329 U. S. 249, 257).

6. The sixth reason advanced is that the petitioners "believe that with respect to the larger furnaces, assembled in Indiana of necessity, that no other conclusion can be reached but that they were created and brought into existence in Indiana" (Pet. 18). Such a conclusion is at complete variance with the facts in the special findings of fact. The findings show that the larger furnaces, the same as the smaller ones, were completely fabricated in Ohio and that the only reason they were transported in partially assembled form from Ohio into Indiana was because no railroad cars or trucks were large enough to transport them fully assembled. The completion of the assembling of the larger furnaces at the customer's plant

in Indiana required less local activity than the assembling that was required with respect to the ice making plant in the **York Mfg. Co.**, case.

7. The seventh reason advanced is that the Supreme Court erred in deciding that the tax could not be laid on 10.7% of the sales price of the furnaces. There was no such question presented to or decided by the Supreme Court of Indiana. The Indiana Gross Income Tax Act does not provide for laying this tax on a portion of gross receipts from interstate commerce, and this was expressly pointed out by this Court in the **J. D. Adams Mfg. Co.**, case. Nor did the petitioners attempt to make a levy either on 10.7% of the gross receipts or on any other portion thereof less than the entire amount of the gross receipts. The 10.7% figure was found in the special findings as the cost of the salaries and wages paid by the seller to its own employees while installing the furnaces in Indiana (Finding 31, R. 32-33). That cost figure was not found for the purpose of serving as a basis for apportionment of gross receipts. It was not contended by the petitioners in this case that they had made an assessment of the tax on only a portion of the gross receipts. The Supreme Court of Indiana clearly pointed out in its opinion that their contention was "that **all** of the income of appellee here involved was derived from the erection and installation in Indiana of one of its manufactured products; that the sources of the gross receipts upon which the tax here in question was levied were indivisible installment contracts for the fabrication, erection and installation of heat treating furnaces '**within the respective plants of customers in Indiana**'; and that **no part** of such income could have been derived from an activity connected with interstate commerce" (R. 48, Emphasis supplied).

The **Dravo** case, relied on by the petitioners for their present contention that a portion of the gross receipts in

the instant case is subject to the Indiana Gross Income Tax, does not support the contention. That case did not involve any gross receipts from interstate commerce. It involved only gross receipts from intrastate activities under construction contracts, some of which activities occurred in West Virginia and some in Pennsylvania, and involved only a separation of gross receipts in accordance with payments made by the Government separately for construction work done in West Virginia and for construction items furnished and delivered by the contractor to the Government in Pennsylvania.

The Commerce Clause, as construed and applied by this Court, does not permit state taxation of even an apportionate part of gross receipts received from exclusively interstate commerce as was here the case. In **Spector Motor Service, Inc., v. O'Connor** (1951), 340 U. S. 602, this Court held that the Commerce Clause prohibited the collection of the Connecticut corporation franchise tax from a foreign corporation doing an exclusively interstate business, and said: "The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

CONCLUSION.

It is respectfully submitted that this case was correctly decided in harmony with the apposite decisions of this Court, and that no valid reason appears in the petition for granting certiorari.

ARTHUR L. GILLIOM,
ROBERT D. ARMSTRONG,
ELBERT R. GILLIOM,
RICHARD L. GILLIOM,
Counsel for the Respondent.

APPENDIX.

Burns' Indiana Statutes Ann., Vol. 11, Part 2, Sections 64-2601 et seq.:

Section 64-2601 (m):

"The term 'gross income,' except as hereinafter otherwise expressly provided, means . . . the gross receipts of the taxpayer received from trades, businesses, or commerce, including admission fees or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, all receipts received from the performance of contracts, . . ."

Section 64-2602:

"**Levy of tax—Date.**—There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 64-2606:

"**Exemptions.**—There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America . . ."